

DENNIS J. HERRERA, State Bar #139669
City Attorney
KRISTEN A. JENSEN, State Bar #130196
THOMAS S. LAKRITZ, State Bar #161234
VICTORIA WONG, State Bar #214289
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Telephone: (415) 554-6547
Facsimile: (415) 554-4747
E-Mail: tom.lakritz@sfgov.org

Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

METRO FUEL LLC, a Delaware limited
liability company,

Plaintiff,

vs.

CITY OF SAN FRANCISCO, a municipal
corporation, COUNTY OF SAN
FRANCISCO, a subdivision of the State
of California, CITY AND COUNTY OF
SAN FRANCISCO, a chartered California
city and county and DOE 1 through DOE
10,

Defendants.

Case No. C07-6067 JSW

**DEFENDANT CITY AND COUNTY OF
SAN FRANCISCO'S OPPOSITION TO
PLAINTIFF METRO FUEL'S MOTION
FOR A PRELIMINARY INJUNCTION**

Hearing Date: November 14, 2008
Time: 9:00 a.m.
Place: Courtroom 2, 17th Floor

Trial Date: October 26, 2009

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SUMMARY OF ARGUMENT

San Francisco Planning Code section 611 is not invalid simply because it prohibits Metro Fuel's business. Nor can it be overturned because the regulation of commercial speech implicates the First Amendment. "[T]o say that the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The Supreme Court has held that offsite advertising and billboards are a subset of commercial speech and must be analyzed differently from other forms of commercial speech. *See Metromedia v. City of San Diego*, 453 U.S. 490 (1981).

Metro Fuel's motion, and its entire case, is premised on what it claims is "an unbroken line of Supreme Court cases confirming that a regulatory scheme restricting speech cannot stand if it is pierced by exceptions that substantially undermine its purported rationale." MPA at p.1. Metro Fuel's theory is based upon its reading of *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420 (1993). But the Ninth Circuit has unequivocally rejected this theory's application to a content-neutral billboard regulation, such as that presented here. *See Ackerley Communications of the Northwest Inc. v. Krochalis*, 108 F.3d 1095, 1099-1100 (9th Cir. 1997).

Moreover, Metro Fuel lacks standing to assert its claims in this case. Each of Metro Fuel's signs identified in its moving papers violates San Francisco law relating to general advertising for reasons not challenged in this case. As a result of the illegality of its only identified signs, Metro Fuel cannot obtain the redress it seeks here, and the Court need never even reach the First Amendment claims addressed above.

Metro Fuel's claims also fail because this Court is bound to adopt the factual and legal findings included in the notices of violation issued by the City, because neither Metro Fuel nor the underlying property owners pursued the administrative or state judicial review of those notices. Because the notices of violation are now final, the legality of those signs cannot be challenged in this action.

BACKGROUND

I. SAN FRANCISCO'S REGULATION OF SIGNS AND ADVERTISING

A. San Francisco Planning Code Article 6

For over 40 years, San Francisco has regulated signs and billboards in the City. In 1965, the City enacted San Francisco Planning Code, Article 6 to regulate and control signs and billboards in San Francisco. S.F., Cal., Planning Code art. 6 (2007).¹ The purpose of San Francisco's regulations is to enhance the character, dignity, and aesthetics of San Francisco, and to promote the public health, safety, and welfare by reducing visual distractions to pedestrians and motorists. *Id.* at § 601.

Like many cities, San Francisco follows the dictates of *Metromedia* and regulates signs based on the onsite and offsite distinction. In San Francisco, onsite signs are designated as "business signs" and offsite signs are designated "general advertising signs." A "business sign" is defined as: "A sign which directs attention to a business, commodity, service, industry or other activity which is sold, offered, or conducted, other than incidentally, on the premises upon which such sign is located, or to which it is affixed." S.F., Cal., Planning Code § 602.3 (2007). A "general advertising sign" is a sign "which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere." *Id.* at § 602.7.

B. San Francisco's Ban On New General Advertising Signs

In 2002, members of the Board of Supervisors ("the Board") sought to prohibit new general advertising signs as of March 5, 2002, and they placed Proposition G on the ballot. *See* San Francisco, Cal., Voter Information Pamphlet And Sample Ballot, Consolidated Primary Election, March 5, 2002 ("Proposition G").² While imposing a ban on new general advertising signs, Proposition G expressly stated that "Nothing in this ordinance shall be construed to prohibit the placement of signs . . . in the public right of way as permitted by local law." *Id.* at p. 102 (codified at S.F., Cal., Planning Code § 611(b).) Moreover, consistent with constitutional limits, Proposition G

¹ S.F., Cal., Planning Code art. 6 (2007) is attached as Exhibit A to San Francisco's Request for Judicial Notice.

² San Francisco, Cal., Voter Information Pamphlet And Sample Ballot, Consolidated Primary Election, March 5, 2002 ("Proposition G") is attached as Exhibit B to San Francisco's Request for Judicial Notice.

expressly stated that it was "not intended to regulate non-commercial speech." *Id.* at § 1(n) (uncodified findings). The following findings were made when Proposition G was adopted:

Preserving the City's Unique Character

(a) General advertising is currently in, adjacent to, and visible from public and historically significant civic spaces including parks, public plazas, historic buildings and the waterfront.

(b) City officials have received complaints from the public about the proliferation of general advertising signs in the City, about the commercialization of the City's public space, the increased size of vinyl signs which cover entire sides of buildings, as well as about general advertising signs placed on architecturally and historically significant buildings, all of which affect the quality of life in San Francisco, adding blight and clutter.

(c) The City currently contains an ample supply of legally permitted general advertising signs.

(d) The number of general advertising signs is increasing all over the City. Many areas of the City are saturated with general advertising signs. In these areas the general advertisements signs are obtrusive, out of scale, and contribute to visual pollution and blight. As population, traffic and building trends grow and shift within the City, it is difficult to assess which areas of the City will be inundated with general advertising signs next.

(e) Tourism, San Francisco's largest revenue generating industry, benefits from the preservation of the City's unique character, architecture and vistas. As general advertising signs become more and more a part of the City's landscape, its distinctive appearance is hidden and the character that tourists visit the City to experience is lost.

Safety

(f) City officials and the public have expressed concern over the impact of the increasing volume of general advertising signs on traffic and pedestrian safety.

(g) Signs identifying local services and businesses are often blocked or obscured by general advertising signs, a practice that confuses and distracts the public from finding those services and businesses.

(h) Planning Code Section 601 identifies the need to reduce hazards such as signs which can distract motorists and pedestrians traveling on the public right of way and increase the potential for accidents, especially in congested parts of the City.

Id. at § 1 (a-h) (uncodified findings).

Proposition G passed with almost 80% of the vote. *See* San Francisco, Cal., Consolidated Primary Election Results, March 5, 2002, Proposition G.³

³ San Francisco, Cal., Consolidated Primary Election Results, March 5, 2002, Proposition G is attached as Exhibit C to the City's Request for Judicial Notice.

C. San Francisco's General Advertising Sign Inventory Requirements

In 2006, the Board wanted to provide a mechanism "to further Proposition G's overall objectives of enhancing [San Francisco]'s livability and quality of life by reducing the proliferation of general advertising signs in [San Francisco] and the resulting clutter, blight, and other problems described in Proposition G." San Francisco, Cal., Ordinance 140-06, Section 1 (d) (June 20, 2006).⁴ To accomplish this, the Board added Planning Code section 604.2, which requires any general advertising company to submit a current, accurate, and complete inventory of its general advertising signs. General advertising sign companies are required to provide detailed information for each general advertising sign. S.F., Cal., Ordinance 140-06, Section 5 (June 20, 2006) (codified at San Francisco, Cal., Planning Code § 604.2(c) (2007).

In order to implement and enforce Section 611, the San Francisco Planning Department has undertaken an exhaustive program to develop an inventory and map all general advertising signs in San Francisco. Declaration of Jonathan L. Purvis ("Purvis Decl."), ¶¶ 5-17, 20; Declaration of Kimberly J. Durandet ("Durandet Decl."), ¶¶ 5-10; Declaration of Ember K. Crouch, ("Crouch Decl.") ¶¶ 4-6.

D. Future Limits On General Advertising Signs

San Francisco is considering taking the next incremental step in addressing the issues created by the proliferation of general advertising signs in San Francisco. In 2007, members of the Board sought to limit new general advertising signs on street furniture, and they placed Proposition K on the ballot. *See* San Francisco, Cal., Voter Information Pamphlet And Sample Ballot, Consolidated Primary Election, November 6, 2007 ("Proposition K").⁵ Proposition K declared that it would be the policy of San Francisco that "there shall be no increase in the number of general advertising signs on street furniture on the public right-of-way, including, but not limited to, transit shelters, kiosks, benches and newspaper racks, over the number authorized by City law and City contracts as of July 1,

⁴ San Francisco, Cal., Ordinance 140-06 (June 20, 2006) is attached as Exhibit D to the City's Request for Judicial Notice.

⁵ San Francisco, Cal., Voter Information Pamphlet And Sample Ballot, Consolidated Primary Election, November 6, 2007 ("Proposition K") is attached as Exhibit E to San Francisco's Request for Judicial Notice.

2007." Proposition K passed with almost 62% of the vote. *See* San Francisco, Cal., Consolidated Primary Election Results, November 6, 2007, Proposition K.⁶ The Board is currently considering legislation that would implement the policy the voters approved by passing Proposition K. On May 13, 2008, Supervisor McGoldrick introduced an ordinance that would codify Proposition K.⁷

E. San Francisco Has An Ample Supply Of General Advertising Signs

Notwithstanding San Francisco's ban on new offsite general advertising signs, San Francisco currently contains an ample supply of general advertising signs. There are at least 27 companies that currently own general advertising signs in San Francisco. Declaration of Jonathan Purvis ("Purvis Decl."), ¶ 6. More importantly, there are at least 1,511 general advertising signs currently in San Francisco's inventory of general advertising signs. *Id.* at ¶ 17.

Despite the ban on new billboards, the number of general advertising signs will likely remain constant. That is because, under San Francisco Planning Code section 604(h), lawfully existing general advertising signs may be maintained and repaired. Purvis Decl. § 18. Indeed, according to the General Advertising Sign Program Coordinator for the Planning Department, no individual or entity has filed or has been required to file a permit application to remove a general advertising sign because the sign had reached "the end of its normal life." Purvis Decl., ¶ 19.

II. SAN FRANCISCO'S STREET FURNITURE

San Francisco has a comprehensive regulatory scheme to advance its twin goals of safety and esthetics with respect to items, including advertising on street furniture, placed in the public right of way. Section 611 expressly provides that general advertising signs are allowed on street furniture only "as permitted by local law." S.F., Cal. Planning Code §611(b). San Francisco has enacted ordinances and adopted policies severely limiting the placement and number of general advertising signs allowed on street furniture. All street furniture is subject to an administrative review for safety

⁶ San Francisco, Cal., Consolidated Primary Election Results, November 6, 2007, Proposition K is attached as Exhibit F to the City's Request for Judicial Notice.

⁷ San Francisco, Cal. Legislative File No. 080658 (introduced May 13, 2008) is attached as Exhibit G to the City's Request for Judicial Notice.

and aesthetics and a public review process allowing residents and neighbors to comment on proposed locations for the various types of street furniture.

A. All Street Furniture is Reviewed for Safety and Aesthetics

1. All Street Furniture in the Public Rights-of-Way is Reviewed by the Department of Public Works

The San Francisco Department of Public Works (DPW) has adopted the following Orders and Guidelines governing the safe design and placement of street furniture in the public right-of-way:

- Amended Order No. 177,159⁸
- Order Nos. 163, 368 and 169,739⁹
- Order No. 163, 369¹⁰
- Guidelines Regarding Regulation of News Racks – Implementing Article 5.4, section 184.12, of the San Francisco Public Works Code and governing the placement of fixed pedestal units in San Francisco.¹¹

2. All Street Furniture in the Public Right-of-Way Must be Approved by the City's Arts Commission

Under section 5.103 of the San Francisco Charter, the San Francisco Arts Commission ("Arts Commission") must "approve the designs for all public structures," including transit shelters, public toilets and public service kiosks and fixed pedestal newsracks in San Francisco.¹² The Arts Commission is comprised of fifteen members. *Id.* "Eleven members shall be practicing arts professionals including two architects, a landscape architect, and representatives of the performing,

⁸ City and County of San Francisco, Department of Public Works, Amended Order No. 177,159 (Sept. 26, 2007) is attached as Exhibit H to San Francisco's Request for Judicial Notice.

⁹ City and County of San Francisco, Department of Public Works, Amended Order Nos. 163,368 (Sept. 8, 1993) and 169,739 (May 5, 1996) are attached as Exhibit I to San Francisco's Request for Judicial Notice.

¹⁰ City and County of San Francisco, Department of Public Works, Amended Order No. 163,369 (Sept. 8, 1993) is attached as Exhibit J to San Francisco's Request for Judicial Notice.

¹¹ City and County of San Francisco, Department of Public Works, Guidelines Regarding Regulation of News Racks (Nov. 2, 2005) is attached as Exhibit K to San Francisco's Request for Judicial Notice.

¹² San Francisco, Cal., Charter, art. V (2006) is attached as Exhibit L to San Francisco's Request for Judicial Notice.

visual, literary and media arts; and four members shall be lay members." *Id* The Arts Commission has implemented Submission Guidelines for the review and approval of the design of structures on public property.¹³ As set forth below, the Arts Commission has approved the design for the transit shelters, automatic public toilets and public service kiosks, and the fixed pedestal newsracks.

B. Transit Shelters

San Francisco has allowed advertising on some transit shelters since 1987. Declaration of Kerstin F. Magary ("Magary Decl."), ¶ 3. Although advertising is permitted on certain transit shelters, San Francisco severely limits-by size and location-the amount of advertising permitted on its transit shelters.

San Francisco Planning Code section 603(j) limits the placement of advertising on transit shelters. The first paragraph of section 603(j) limits the areas of San Francisco where advertising can be placed on transit shelters and the size of the advertising that is allowed. The second paragraph of section 603(j) specifically prohibits the placement of advertising on transit shelters in certain areas of San Francisco.

San Francisco has also entered into agreements that limit the number and locations of transit shelters that can display advertising. Magary Decl., ¶¶ 3, 4; Exhs. A, B; Declaration of Gail R. Stein ("Stein Decl."), ¶ 11; Exh. A. Under San Francisco's previous Advertising Transit Shelter Agreement with CBS Outdoor, San Francisco had 1063 transit shelters. Magary Decl., ¶ 6. Of those 1063 transit shelters, advertising was allowed on up to 697 transit shelters and prohibited on 366 shelters. *Id*. Although CBS Outdoor was allowed to construct up to 1,250 transit shelters, it did not achieve that number. Magary Decl., ¶ 6. Instead, DPW denied CBS Outdoor's permit applications for hundreds of proposed locations due to objections and protests from adjoining property owners and/or neighbors. Magary Decl., ¶ 7. Under the CBS Outdoor agreement, the ratio of commercial to non-commercial transit shelters was limited at 2 to 1. Magary Decl., ¶ 8. For those shelters where advertising was allowed, the agreement limited where on the shelter advertising could be placed.

¹³ City and County of San Francisco, San Francisco Arts Commission Civic Design Review Submission Guidelines are attached as Exhibit M to San Francisco's Request for Judicial Notice (<http://www.sfartscommission.org/CDR/forms/Guidelines.pdf>) (visited August 25, 2008).

Magary Decl., ¶¶ 9, 10. Since March 2002, DPW has only issued four permits to install new transit shelters in the public right-of-way. Declaration of Dan McKenna ("McKenna Decl."), ¶ 27; Exh. D. Of those four transit shelters, three-T1567, T1568 and T1570-were installed as non-commercial shelters. McKenna Decl., ¶ 27; Exh. D; Stein Decl., ¶ 11; Exh. A.

The San Francisco Municipal Transit Agency ("SFMTA") recently entered into an agreement with Clear Channel Outdoor that took the place of the CBS Outdoor agreement. Stein Decl., ¶¶ 8-11. Under the SFMTA's new Transit Shelter Advertising Agreement, Clear Channel Outdoor is required to maintain a minimum of 1100 transit shelters and is allowed to maintain up to 1500 transit shelters, and a minimum of 39 and a maximum of 150 Commercial Kiosks. Stein Decl., ¶ 13. The ratio of commercial to non-commercial transit shelters remains limited at 2 to 1. Stein Decl., ¶ 14. In addition, Clear Channel Outdoor is prohibited from placing advertisements on more than one wall of any transit shelter. Stein Decl., ¶ 15. Finally, under the agreement, SFMTA retained the right to designate the locations of all transit shelters and kiosks. Stein Decl., ¶ 17. After a lengthy review process, the Arts Commission recently approved the design of the new transit shelters. Stein Decl., ¶¶ 29-35.¹⁴

C. Automatic Public Toilets and Public Service Kiosks

On August 2, 1994, the City entered into an agreement with JCDecaux "to establish an Automatic Public Toilet Program for the benefit of the residents and visitors to the City and County of San Francisco." McKenna Decl., ¶ 6; Exh. A. Under this agreement, the City designated the initial 27 locations of the automatic public toilets. McKenna Decl., ¶ 9. There are currently 25 Automatic Public Toilets in San Francisco, all of which were permitted and installed before March 5, 2002. McKenna Decl., ¶ 12. Advertising is not permitted on any of the Automatic Public Toilets. McKenna Decl., ¶ 11.

¹⁴ San Francisco Arts Commission, Civic Design Review Committee, Minutes (Sept. 17, 2007); (Oct. 15, 2007); (Feb. 25, 2008); and (June 16, 2008) are attached as Exhibits N, O, P and Q, respectively. San Francisco Arts Commission, Minutes (Dec. 3, 2007) are attached as Exhibit R.

In return for allowing JCDecaux to install and maintain Automatic Public Toilets in San Francisco, JCDecaux obtained the right to install and maintain Public Service Kiosks.¹⁵ McKenna Decl., ¶ 13. The agreement limited the placement of Public Service Kiosks to the "Downtown Area," which was defined as "the geographic area of the CITY bounded on the south by the southerly line of Folsom Street, on the west by the westerly line of Van Ness Avenue extended north to the San Francisco Bay, and on the north and east by the shoreline of the San Francisco Bay." McKenna Decl., ¶ 14; Exh. A. There are currently 112 Public Service Kiosks in San Francisco and most are currently located in the Downtown Area. McKenna Decl., ¶ 16. Almost all of the Public Service Kiosks currently in San Francisco were permitted and installed before March 5, 2002. McKenna Decl., ¶ 17. Only two Public Service Kiosks-Castro/18th Streets and Market/Church Streets-have been permitted and installed since March 5, 2002. McKenna Decl., ¶ 17; Exh. B.

D. Fixed Pedestal Newsracks

Planning Code section 603(j) restricts the placement of advertising placed on fixed pedestal newsrack units in accordance with Public Works Code section 184.12¹⁶

Public Works Code section 184.12(f)(3)(A)(i) limits the placement of fixed pedestal newsracks to "areas of the City which have one or more of the following: extensive public transit service, usage, and/or facilities; large concentrations of freestanding newsracks; or large numbers of pedestrians." Under the City's Pedestal-Mounted Newsrack Agreement advertising may only be placed on fixed pedestal units in the "Advertising Zone," which is defined as

the geographic area of the City bounded on the south by the southerly line of Berry Street (including the sidewalk located along the south side of Berry Street) on the west by the westerly line of Polk Street (including the sidewalk located on the west side of Polk Street) extended north to the San Francisco Bay.¹⁷

¹⁵ Section 1.01 (M) of the Automatic Public Toilet and Public Service Kiosk Agreement defined "Public Service Kiosks as having two advertising panels and either a newsstand alcove or a public service informational panel. McKenna Decl., ¶ 13; Exh. A.

¹⁶ San Francisco, Cal., Public Works Code art. 5.4 (2007) is attached as Exhibit S to San Francisco's Request for Judicial Notice.

¹⁷ In the Pedestal-Mounted Newsrack Agreement, the City agreed that if state law changed to allow fixed pedestal units on Van Ness Avenue, then the western border would be changed to the westerly line of Van Ness Avenue (including the sidewalk on the west side of Van (continued on next page)

1 The Board enacted Public Works Code section 184.12 regulating fixed pedestal newsracks.

2 The Board made the following findings when it enacted section 184.12:

3 (1) The City and County of San Francisco has a substantial interest in
4 promoting the public health, safety, welfare and convenience of its citizens and
5 visitors by ensuring that public streets, public sidewalks and public rights-of-
ways are not unreasonably obstructed by newsracks and that newsracks are
properly maintained.

6 (2) In recent years, the proliferation of newsracks on City streets, and
7 particularly poorly maintained or abandoned freestanding newsracks, have
8 contributed to the congestion of public sidewalks, impeded the flow of
pedestrian and vehicular traffic, interfered with the use of streets, public
sidewalks and public rights-of-ways, presented hazards to persons and
property, contributed to the litter problems of public sidewalks, and resulted in
visual blight.

9 (3) The City and County of San Francisco has a substantial interest in
10 preserving and protecting its unique visual and aesthetic qualities . . . To that
11 end, . . . the City must take steps to reduce the visual blight, the inconvenience
12 and the hazards associated with unlimited numbers of designs of newsracks,
poorly maintained newsracks and the virtually unrestricted placement of
newsracks on public streets, public sidewalks and public rights-of-way.

13 In 2002, the City entered into a Pedestal-Mounted Newsrack Agreement with Clear Channel
14 Adshel "to replace the unsightly clutter of an estimated many thousands of single publication
15 newsracks with 1000 pedestal-mounted multi-publication newsracks." McKenna Decl., ¶ 20; Exh. C.
16 Under section 3.1(a) of this agreement, Clear Channel Adshel is required to "install, operate and
17 maintain, on public property up to 1,000 Fixed Pedestal Units in Fixed Pedestal Zones." McKenna
18 Decl., ¶ 21; Exh. C. At least 485 of those Fixed Pedestal Units were allowed to be placed in the
19 "Advertising Zone." McKenna Decl., ¶¶ 21; 25 Exh. C

20 On October 20, 2003, the San Francisco Arts Commission, Civic Design Review Committee
21 gave final approval to Clear Channel's design for the Fixed Pedestal Newsracks. McKenna Decl., ¶
22 24. These Fixed Pedestal Units improve the aesthetics of San Francisco streets. *See* Declaration of
23 Grace Moore, ¶¶ 5-6; Exh. A.

24
25 (footnote continued from previous page)

26 Ness Avenue). McKenna Decl., ¶ 20, Exh. C. Sometime in 2002, California enacted legislation that
27 allowed the City to authorize the placement of Pedestal-Mounted Newsracks on Van Ness Avenue.
28 McKenna Decl., ¶ 25.

III. METRO FUEL'S BUSINESS

Metro Fuel LLC ("Metro Fuel") is a company owned by Fuel Outdoor Holdings, LLC ("Fuel Outdoor"). Declaration of Michael A. Freedman ("Freedman Decl."), ¶ 1. Metro Fuel entered the San Francisco market by acquiring the assets of Metro Lights, LLC ("Metro Lights") in August, 2006. Freedman Decl., ¶ 2. Metro Fuel claims to operate 164 "panel signs" in San Francisco. Freedman Decl., ¶ 3. According to Fuel Outdoor's website¹⁸: "Metro Lights Panels are illuminated 6'x 4' displays that reach drivers and pedestrians in a variety of environments. . . . Saturate a neighborhood or 'road block' key areas to reach commuters twice daily." Metro Fuel concedes, as it must, that none of its 164 signs are legally permitted. Freedman Decl., ¶¶ 9, 10.

While Metro Fuel claims to operate 164 "panel signs" in San Francisco, it has failed to produce evidence to substantiate this claim. Instead, it appears that Metro Fuel is not content to wait for a ruling from this court as to the legality of its existing signs, but continues to install general advertising signs (also without permits) in violation of Section 611. Declaration of Daniel A. Sider ("Sider Decl."), ¶¶ 5-10; Exh. A; Crouch Decl., ¶¶ 7-8; Exh. A. As part of the inventory process, the Planning Department has identified many illegal signs, which it believes are owned or operated by Metro Fuel. Purvis Decl., ¶ 21. To date, the Planning Department has issued 29 notices of violation for the illegal signs. Purvis Decl., ¶ 21; Request for Judicial Notice, Exh. T. In addition, the Department of Building Inspection ("DBI") has issued a notice of violation and an Order of Abatement for Metro Fuel's sign at 360 5th Street. Request for Judicial Notice, Exh. T.

Although it has refused to disclose the locations of all of its signs, Metro Fuel has submitted the declarations of seven individuals establishing the existence of seven signs in San Francisco.

- 360 5th Street (Declaration of Michael T. Fetterman, ¶ 2)
- 100 2nd Street (Declaration of Devendra Patel, ¶ 2)
- 376 Castro Street (Declaration of Naz Auto Service (Nazir Javaid), ¶ 2.)
- 1398 California Street (Declaration of Cable Car Cleaners (Stephanie Fonseca), ¶ 2)

¹⁸ See <http://www.fueloutdoor.com/> (follow "enter" hyperlink; then follow "Products" hyperlink; then follow "Metro Lights Panels" hyperlink; then follow "San Francisco" hyperlink) (visited August 25, 2008).

- 701 10th Avenue (Declaration of Denhards Market (Anton Haleth), ¶ 2.)
- 1700 Polk Street (Declaration of Polk & Clay Liquor (Jennifer Lenh), ¶ 2)
- 1485 Bush Street (Declaration of Vijay Patel, ¶ 2.)

The Planning Department has issued notices of violations for all of these signs. Request for Judicial Notice, Exh. T. Moreover, Planning Department staff has determined that all of these signs violate other sections of the Planning Code and would not be allowed, even if Section 611 had not been enacted. Durandet Decl., ¶¶ 12-18.

In addition, Mr. Freedman attached eight pictures to his declaration of "a variety of [Metro] Fuel's signs as they are situated in the San Francisco streetscape." Freedman Decl., ¶ 5, Exh. A. Mr. Freedman did not give the locations of these signs. Planning Department staff has reviewed these pictures and has identified the locations for each of these signs: (1) 110 Franklin Street; (2) 168 Eddy Street; (3) 376 Castro Street; (4) 3100 California Street; (5) 1343 Polk Street; (6) 1900 Market Street; (7) 75 Howard Street; and (8) 3420 Taylor Street. Durandet Decl., ¶¶ 20-27. Planning Department staff has further determined that all of these signs violate other sections of the Planning Code and would not be allowed, even if Section 611 had not been enacted. Durandet Decl., ¶¶ 19-26.

Interestingly, Mr. Freedman failed to mention in his declaration that one of Fuel Outdoor's companies was recently awarded a 20-year contract to provide transit shelters in Miami, Florida. Fuel Outdoor's website boasts¹⁹ that "Fuel currently has Bus Shelters throughout the City of Miami, covering the most in demand neighborhoods in the burgeoning market." What is interesting about this is that Miami, like San Francisco, has a ban on general advertising signs, with an exception that allows them to be placed in the public right-of-way.²⁰

¹⁹ See <http://www.fueloutdoor.com/> (follow "enter" hyperlink; then follow "Products" hyperlink; then follow "Panel Advertising" hyperlink; then follow "Bus Shelters" hyperlink; then follow "Miami" hyperlink) (visited August 25, 2008).

²⁰ Article 10 of the Miami Zoning Ordinance is attached as Exhibit V to San Francisco's Request for Judicial Notice. Section 10.1.3. provides that "[t]hese regulations apply to all signs, except those signs located in the public right-of-way, within the City whether or not a permit or other approval is required, unless otherwise specifically regulated." Section 10.4.5 provides that "[e]xcept as otherwise provided in Articles 4 and 10 and/or the City Code, or, pursuant to this subsection, no new freestanding 'Outdoor advertising signs,' as defined above shall be allowed."

DISCUSSION

I. LEGAL STANDARD

"It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1977) (citation omitted) (emphasis in original). A preliminary injunction is only warranted if the moving party establishes either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co.*, 240 F.3d 832, 839-840 (9th Cir.2001). "These formulations are not different tests, but represent two points on a sliding scale in which the degree of irreparable harm increases as likelihood of success on the merits decreases." *Associated Gen. Contractors of Calif., Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir.1991) (quoting *Big Country Foods, Inc. v. Board of Education*, 868 F.2d 1085, 1088 (9th Cir. 1989)). Under either formulation, the party seeking a preliminary injunction always must establish that a significant threat of irreparable harm exists. *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). If the moving party fails to demonstrate irreparable harm, a court need not reach the issue of likelihood of success on the merits. *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). In addition, in the Ninth Circuit, a court must also consider the public interest when it assesses the propriety of issuing an injunction. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002).

As set forth below, Metro Fuel failed to carry its burden of persuasion to establish that it is entitled to a preliminary injunction.

II. OFFSITE GENERAL ADVERTISING, AS COMMERCIAL SPEECH, IS AFFORDED ONLY LIMITED FIRST AMENDMENT PROTECTION

Because this case presents a First Amendment challenge in the context of general advertising signs (billboards) – a discrete form of communication governed by its own line of judicial precedent that is largely ignored by Metro Fuel in favor of cases of limited or no applicability – the Court should view Metro Fuel's challenge with skepticism.

1 Metro Fuel argues that commercial advertising enjoys "robust" First Amendment protection.
 2 Memorandum of Points in Authorities in Support of Motion for a Preliminary Injunction ("MPA") at
 3 pp. 12-14. While it is unclear what Metro Fuel means by "robust," it is clear what the Supreme Court
 4 has said about the level of First Amendment protection commercial speech is entitled to: "Our
 5 jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection,
 6 commensurate with its subordinate position in the scale of First Amendment values,' and is subject to
 7 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Board*
 8 *of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v.*
 9 *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). "The Constitution therefore accords a lesser
 10 protection to commercial speech than to other constitutionally guaranteed expression. The protection
 11 available for particular commercial expression turns on the nature both of the expression and of the
 12 governmental interests served by its regulation." *Central Hudson Gas & Electric Corp. v. Public*
 13 *Service Comm'n*, 447 U.S. 557, 562-563 (1980) (internal citation omitted).

14 In *Central Hudson*, the Court developed a four-part analysis to determine whether a particular
 15 kind of commercial speech can be banned or regulated:

16 At the outset, we must determine whether the expression is protected by the
 17 First Amendment. For commercial speech to come within that provision, it at
 18 least must concern lawful activity and not be misleading. Next, we ask
 19 whether the asserted governmental interest is substantial. If both inquiries
 yield positive answers, we must determine whether the regulation directly
 advances the governmental interest asserted, and whether it is not more
 extensive than is necessary to serve that interest.

20 *Id.* at p. 566.

21 Applying the four-part *Central Hudson* test to review a ban on offsite advertising, the Court
 22 has held that offsite advertising and billboards are a subset of commercial speech and must be
 23 analyzed differently from other forms of commercial speech. See *Metromedia v. City of San Diego*,
 24 453 U.S. 490 (1981). *Metromedia* involved a San Diego ordinance that allowed "onsite" commercial
 25 signs but prohibited "[offsite] commercial . . . and noncommercial communications using fixed-
 26 structure signs," that is, billboards. *Id.* at 496. The San Diego ordinance contained twelve
 27 exceptions, and one of the exceptions stated that the ordinance did not apply to "[b]ench signs located
 28 at designated public transit bus stops; provided, however, that such signs shall have any necessary

permits." *Id.* at 496, n.3. After the California Supreme Court upheld the ordinance under the federal and California Constitutions, seven Justices of the U.S. Supreme Court, applying the commercial speech test set forth in *Central Hudson*, held that the ordinance's restrictions on commercial speech did not violate the First Amendment. *See id.* at 508-512 (plurality opinion); *id.* at 541 (Stevens, J. (joining plurality as to commercial speech)); *id.* at 555-69 (Burger, J. (finding ordinance entirely constitutional)); *id.* at 569 (Rehnquist, J. (same).)

The *Metromedia* Court held, first, that there was no "substantial doubt" that the measure's two stated purposes—"to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City"—are "substantial governmental goals." *Id.* at 493, 507-08. Second, the Court held that the prohibition on commercial billboards directly advanced the city's safety and aesthetic interests, even though the city had relied only on its "legislative judgment that billboards are traffic hazards" and cause aesthetic blight. *Id.* at 508-510. Finally, the Court held that the ordinance was no broader than necessary to serve the city's interests. As it explained, "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Id.* at 508.

The *Metromedia* Court also held that the law did not violate the First Amendment even though it allowed onsite commercial billboards but prohibited "identical billboards, equally distracting and unattractive," that displayed offsite messages. *Id.* at 511. The fact that the city "has obviously chosen to value one kind of commercial speech – onsite advertising – more than another kind of commercial speech – offsite advertising," was legally permissible. *Id.* at 512. As the Court explained: "The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance – onsite commercial advertising – its interests should yield. We do not reject that judgment." *Id.*

Moreover, "the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because

1 it permits onsite advertising.” *Id.* at 511. And “the city may believe that offsite advertising, with its
2 periodically changing content, presents a more acute problem than does onsite advertising.” *Id.*

3 The Court reaffirmed *Metromedia* in *Members of City Council of the City of Los Angeles v.*
4 *Taxpayers for Vincent*, 466 U.S. 789, 807, (1984). *Metromedia*, therefore, remains the controlling
5 Supreme Court case analyzing the ability of cities to regulate outdoor advertising in order to further
6 public safety and aesthetics.

7 The Ninth Circuit has expressly upheld total bans on billboards or an on-site/off-site
8 distinction based upon *Metromedia*. See, e.g., *Clear Channel Outdoor, Inc. v. City of Los Angeles*,
9 340 F.3d 810, 814 (9th Cir. 2003); *Ackerley Communications of the Northwest Inc. v. Krochalis*, 108
10 F.3d 1095, 1099-1100 (9th Cir. 1997); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir.
11 1993).

12 **III. METRO FUEL'S "UNDERINCLUSIVE THEORY" DOES NOT APPLY TO** 13 **BILLBOARD REGULATION**

14 Metro Fuel's motion, and its entire case, is premised on what it claims is "an unbroken line of
15 Supreme Court cases confirming that a regulatory scheme restricting speech cannot stand if it is
16 pierced by exceptions that substantially undermine its purported rationale." MPA at p.1. Metro
17 Fuel's theory is based upon its reading of *Greater New Orleans Broadcasting Ass'n, Inc. v. United*
18 *States*, 527 U.S. 173 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); and *City of*
19 *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420 (1993). Metro Fuel's reliance on these
20 cases is misplaced.

21 The Supreme Court has never applied this "underinclusive theory" to a content-neutral
22 billboard regulation. Indeed, Justice White's opinion for the Court in *Metromedia* explained that
23 "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing
24 natures, values, abuses and dangers' of each method. We deal here with the law of billboards."
25 *Metromedia*, 453 U.S. at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). As noted above,
26 seven Justices held that San Diego's ban was constitutional even though it was substantially
27 underinclusive. *Id.* at 508-12.

Moreover, the Ninth Circuit has unequivocally rejected the underinclusive theory's application to a content-neutral billboard regulation, such as that presented here. In *Ackerley*, 108 F.3d 1095, the Ninth Circuit held that Seattle's regulation limiting the construction and relocation of billboards was constitutional under *Metromedia* as a matter of law, even though Seattle had no detailed proof that the billboard regulation advanced the city's interest in traffic safety and esthetics. In attacking Seattle's regulation, the plaintiff in *Ackerley* argued "that since *Metromedia*, the Court has imposed a greater evidentiary burden on a municipality trying to justify a restriction on commercial speech, see, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1993); and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)." *Id.* at 1097-1098 (parallel citations omitted). The Ninth Circuit rejected the argument, noting that the Supreme Court itself has never said that these cases undermine its holding in *Metromedia*. *Id.* at 1099. The Ninth Circuit explained that *Metromedia* is still binding law:

[W]here a Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court 'the prerogative of overruling its own decisions.'

Id. (citations omitted). Rejecting the applicability of the "underinclusiveness theory" to billboard regulations, the Ninth Circuit held "that *Metromedia* continues to control regulation of billboards." *Id.*

Like the Supreme Court, the Ninth Circuit continues to recognize the distinction between the regulation of billboards and other forms of commercial speech. In *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006), the Ninth Circuit reviewed the validity of the City of Redmond's prohibition on the use of portable signs as a restriction on commercial speech. *Id.* at 740. The Ninth Circuit concluded that *Metromedia* did not control because the City of Redmond's prohibition did not involve the regulation of billboards. "This distinction is significant because billboards are fixed, permanent structures that are more intrusive to community aesthetics than portable sandwich boards. The externalities of billboards include perdurable visual pollution that pervades a substantial volume of our eyesight and grows into an unignorable part of our cultural landscape." *Id.* at 744.

Metro Fuel relies extensively on *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F. Supp. 2d 927 (C.D. Cal. 2006), *appeal docketed*, No. 07-55179 (9th Cir. Feb. 1, 2007), and *World Wide Rush, LLC v. City of Los Angeles*, --- F.Supp.2d ----(C.D. Cal. 2006), 2008 WL 2477440, *appeal docketed*, No. 08-56062 (9th Cir. Jun. 26, 2008) to support its motion for a preliminary injunction in this case. Indeed, Metro Fuel argues that *Metro Lights* and *World Wide Rush* "factually are squarely on point" and apply the "underinclusive theory" articulated in *Greater New Orleans, Rubin*, and *Discovery Network. Id.*

Metro Fuel's reliance on *Metro Lights* and *World Wide Rush* fails for at least three reasons. First, both cases are on appeal to the Ninth Circuit, a fact that Metro Fuel fails to mention in its brief. Second, neither case acknowledged that *Ackerley* is controlling precedent in the Ninth Circuit on this issue and that *Metromedia* is the controlling Supreme Court precedent on the regulation of billboards. Third, as set forth below, San Francisco's comprehensive regulatory scheme is factually distinct from the ordinances challenged in *Metro Lights* and *World Wide Rush*.

IV. SAN FRANCISCO'S REGULATION OF GENERAL ADVERTISING DOES NOT VIOLATE THE FIRST AMENDMENT

A. Metro Fuel Has Failed To Establish That The Advertising On Its Signs Is Protected By The First Amendment

Without citation or factual support, Metro Fuel contends that San Francisco "does not and cannot contend that the advertisements on [Metro Fuel]'s signs concern unlawful activities or are misleading." MPA at 14. San Francisco has never conceded this point. More importantly, Metro Fuel failed to meet its burden of proof with respect to this preliminary injunction motion by failing to introduce any *evidence* with its moving papers establishing that the advertisements placed on all of Metro Fuel's signs concern lawful activity or are truthful. Metro Fuel submitted a declaration of Michael A. Freedman, which states that Metro Fuel's signs "are made available to national and local advertisers" and that they "may be used to display . . ." advertising. Freedman Decl., ¶ 6. But Metro Fuel failed to offer evidence that the advertisements actually placed all of on Metro Fuel's signs concern lawful activity or are truthful.

The Supreme Court has held numerous times that commercial speech related to illegal activity or that is likely to deceive the public may be banned. *See, e.g., Central Hudson*, 447 U.S. at 563-564.

Thus, Metro Fuel failed to establish that the advertisements placed on all of Metro Fuel signs are entitled to First Amendment protections. Because Metro Fuel failed to establish that the advertisements placed on Metro Fuel signs are entitled to First Amendment protections and , therefore, is not entitled to a preliminary injunction. *See Clear Channel Outdoor*, 340 F.3d at 817 (vacating district court's preliminary injunction because sign company "offered no specific evidence" establishing entitlement to a preliminary injunction.)

B. Section 611 Implements Substantial Governmental Interests

Section 611 implements San Francisco's substantial governmental interests of protecting pedestrians and motorists and preserving San Francisco's unique character. As the Court stated in *Metromedia*, 453 U.S. at 507-508:

Nor can there be substantial doubt that the twin goals that the ordinance seeks to further-traffic safety and the appearance of the city-are substantial governmental goals. It is far too late to contend otherwise with respect to either traffic safety, *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) or esthetics, see *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26 (1954)

In *Taxpayers for Vincent*, 466 U.S. at 806-807, the Supreme Court reaffirmed *Metromedia* and held that aesthetic interests were substantial enough to justify a ban on billboards:

We reaffirm the conclusion of the majority in *Metromedia*. The problem addressed by this ordinance-the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property-constitutes a significant evil within the City's power to prohibit. "[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.* 427 U.S. 71 (1976) (plurality opinion).

The Ninth Circuit likewise has stated:

Insofar as billboards are concerned, the burden on the City of meeting the first prong of the *Central Hudson* test is not a great one. Had the City enacted the ordinance with a clear statement of purpose indicating the City's interest in eliminating the hazards posed by billboards to pedestrians and motorists and in preserving and improving its appearance, the City would have demonstrated that the ordinance sought to implement substantial governmental interests, and would thus have satisfied the first prong of the *Central Hudson* test. *See Metromedia*, 453 U.S. at 493, 507-10.

Desert Outdoor Advertising, Inc. v. The City of Moreno Valley, 103 F.3d 814, 819 n.2 (9th Cir. 1996).

Here, when the voters enacted Proposition G they stated that the purpose was to preserve San Francisco unique character and to reduce hazards to motorists and pedestrians associated with the proliferation of billboards and general advertising signs. RJN, Exh B. Section 611, therefore, implements substantial governmental interests as a matter of law. *Desert Outdoor Advertising*, 103 F.3d at 819 n.2.

C. Section 611 Directly And Materially Advances San Francisco's Substantial Governmental Interests

Metro Fuel contends that Section 611 fails the third prong of the *Central Hudson* test because the City failed to "perform any studies" "regarding whether advertising signs truly pose a threat to traffic safety or meaningfully affect the aesthetics of the streetscape." MPA at 17. As a matter of law and of fact, this argument fails. As stated above, the Ninth Circuit has rejected the underinclusive theory's application to billboard regulation. *Ackerley*, 108 F.3d at 1099.

1. Safety

As a matter of law, Section 611 directly and materially advances San Francisco's substantial governmental interest in stopping the proliferation of general advertising signs in order to protect pedestrians and motorists. In *Metromedia*, the Court concluded that San Diego's ban on off-site general advertising signs while allowing identical on-site general advertising signs passed the third prong of the *Central Hudson* test.

Noting that "[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway," *ibid.*, and that whether the "distracting effect contributes to traffic accidents invokes an issue of continuing controversy," *ibid.*, the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." There is nothing here to suggest that these judgments are unreasonable. As we said in a different context, *Railway Express Agency, Inc. v. New York, supra*, at 109:

"We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation has no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

1 *Metromedia*, 453 U.S. at 508-509 (emphasis added). The Ninth Circuit has held that under
 2 *Metromedia*, cities are not required to provide "detailed proof that the billboard regulation will in fact
 3 advance the city's interests" in traffic safety and esthetics. *Ackerley*, 108 F.3d at 1099-1100.

4 The *Metro Lights* court held that Los Angeles' regulatory scheme²¹ did not directly advance
 5 its goal of traffic safety because "the City's Street Furniture Program gives the City's contractor an
 6 exclusive right to place thousands of off-site signs next to traffic lanes *in every area of the City where*
 7 *a transit shelter, kiosk or 'amenity' is located.*" *Metro Lights*, 488 F. Supp. 2d at 943 (emphasis
 8 added).

9 San Francisco's regulatory scheme differs in these important ways: (1) San Francisco limits
 10 the number of advertising allowed on street furniture; (2) San Francisco limits the areas of the City in
 11 which advertising can be placed on street furniture; (3) all street furniture is reviewed and approved
 12 for pedestrian and motorists safety; and (4) San Francisco requires that all street furniture be regularly
 13 inspected, cleaned and maintained.

14 **2. Preserving San Francisco's Unique Character**

15 The *Metromedia* Court also found as a matter of law that San Diego's ban on offsite general
 16 advertising signs directly and materially advanced its aesthetics goal:

17 We reach a similar result with respect to the second asserted justification for
 18 the ordinance-advancement of the city's esthetic interests. It is not speculative
 19 to recognize that billboards by their very nature, wherever located and however
 20 constructed, can be perceived as an "esthetic harm." San Diego, like many
 21 States and other municipalities, has chosen to minimize the presence of such
 22 structures. Such esthetic judgments are necessarily subjective, defying
 objective evaluation, and for that reason must be carefully scrutinized to
 determine if they are only a public rationalization of an impermissible purpose.
 But there is no claim in this case that San Diego has as an ulterior motive the
 suppression of speech, and the judgment involved here is not so unusual as to
 raise suspicions in itself.

23 *Metromedia*, 453 U.S. at 510.

24
 25
 26
 27 ²¹ Los Angeles, Cal., Municipal Code, div. 62 (1996) is attached as Exhibit W to San
 Francisco's Request for Judicial Notice.

San Francisco's regulatory scheme easily satisfies this test. As with safety concerns, San Francisco addresses aesthetics concerns by requiring all street furniture placed on the public right-of-way to be approved by the San Francisco Arts Commission.

D. Section 611 Is No More Extensive Than Necessary

Central Hudson's final prong requires that a commercial speech regulation be no more extensive than necessary to serve the government's ends. *Central Hudson*, 447 U.S. at 566. In *Metromedia*, the Court held that a ban on commercial offsite billboards easily meets this requirement, since "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Metromedia*, 453 U.S. at 508.

Here, Section 611 meets this test. San Francisco has implemented a comprehensive regulatory scheme that goes no further than necessary to address the evil caused by the proliferation of offsite advertising. Indeed, San Francisco has an amply supply of general advertising signs and there is no suggestion that the supply is inadequate.

V. THIS COURT MUST GIVE PRECLUSIVE EFFECT TO THE UNCHALLENGED FACTUAL AND LEGAL DETERMINATIONS MADE IN THE ADMINISTRATIVE PROCEEDINGS AGAINST METRO FUEL'S SIGNS

The Court must give preclusive effect to the unchallenged 29 Notices of Violation ("NOV") issued by the Planning Department (attached as Exhibit T to San Francisco's Request for Judicial Notice) and the NOV and Order of Abatement issued by the Department of Building Inspection (attached as Exhibit U to San Francisco's Request for Judicial Notice). These NOV's were issued because the Planning Department and Department of Building Inspection investigated and determined that these signs had been installed without a permit. Because Metro Fuel failed to challenge the NOV's administratively and judicially, the factual determinations and legal conclusions of these NOV's-these signs violate the Planning and Building Codes are now final.

Title 28 U.S.C. section 1738 requires federal courts to give the same preclusive effect to state court judgments, as they would be given in the state in which they were rendered. *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994). In *Miller*, the Ninth Circuit stated that *University of Tennessee v. Elliot*, 478 U.S. 788 (1986),

requires [federal courts] to give preclusive effect, at a minimum, to the factfinding of state administrative tribunals. We have gone farther, however, and held that 'the federal common law rules of preclusion described in *Elliot* extend to state administrative adjudications of legal as well as factual issues, even if unreviewed, so long as the state proceeding satisfies the requirements of fairness outlined in [*United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966)]."

Id. at 1032-1033 (citation omitted).

The fairness requirements of *Utah Construction* are: (1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly before it, and (3) that the parties have an adequate opportunity to litigate. 384 U.S. at 422. The threshold inquiry "is whether a state administrative proceeding was conducted with sufficient safeguards 'to be equated with a state court judgment.'" *Miller*, 39 F.3d at 1033. "A federal court should ordinarily give preclusive effect when the state court would do so." *Id.* This is so even in cases of unreviewed state agency determinations. *Id.* Because California has adopted the standards articulated in *Utah Construction*, the only question a federal court must answer is "whether the administrative hearing met the requirements of California law such that a California court would have accorded the determination preclusive effect." *Id.* There is no question that a California court would give preclusive effect to the unreviewed notices of violation from the Planning Department and Department of Building Inspection.

In order to challenge a decision of an administrative agency in California, one must demonstrate that he has exhausted all available administrative procedures – including all available administrative appeals of an agency's decision. *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* 35 Cal.4th 1072, 1080 (2005). "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." *Abelleira v. District Court of Appeal* 17 Cal.2d 280, 292 (1941). In addition to exhausting administrative remedies, a plaintiff must also exhaust judicial remedies. "[J]udicial review of any decision of a local agency . . . may be had pursuant to Code of Civil Procedure section 1094.5, only if the petition for writ of mandate pursuant to such section is filed . . . not later than the 90th day following the date on which the decision becomes final." Code Civ. Proc. § 1094.6, subd. (b). The California Supreme Court has held that

"unless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." *Johnson v. City of Loma Linda*, 24 Cal.4th 61, 69-70 (2000). "Exhaustion of judicial remedies . . . is necessary to avoid giving binding effect to the administrative agency's decision, because the decision has achieved finality due to the aggrieved party's failure to pursue the exclusive judicial remedy for reviewing administrative action." *Id.*; see also *City and County of San Francisco v. Ang*, 97 Cal.App.3d 673, 677 – 679 (1979).

Here, in order to pursue judicial consideration of the NOV's issued by the Planning Department, the City's Planning Code required the sign owners to seek reconsideration of the NOV's by an administrative law judge. S.F. Planning Code § 610(d)(1)B. No such request for reconsideration was filed, and thus no administrative review of the Planning Department NOV's ever occurred. As a result, the sign owners are now precluded from seeking judicial relief in the form of a state court writ or administrative mandamus pursuant to Code of Civil Procedure §1094.5. They cannot simply circumvent these requirements by seeking redress from this Court. Similarly, the DBI NOV was the subject of an administrative appeal and resulted in the issuance of an Order of Abatement. As in the case of the Planning Department NOV's, because neither the owners nor Metro Fuel sought judicial review of the Order of Abatement, the factual and legal determinations made by the DBI Director are binding and preclusive for purposes of this case.

In *Briggs v. City of Rolling Hills Estates*, 40 Cal.App.4th 637 (1995) , a homeowner sued after the issuance of a building permit was conditioned on the removal of an existing deck. *Id.* at 640. The trial court granted summary judgment in favor of the city finding the homeowner's 42 U.S.C. § 1983 cause of action was precluded by the failure to challenge the city's action directly by administrative mandamus. *Id.* After analyzing and discussing state and federal law, the Court of Appeals affirmed.

The Court of Appeal observed the homeowner

never sought to set aside the city's decision by petitioning for a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. Plaintiffs could and should have sought judicial review of the city's decision by administrative mandamus; if the condition to which plaintiffs objected was improperly imposed, it could have been vacated pursuant to section 1094.5. Plaintiffs completely bypassed the proper procedure and instead sought damages and injunctive relief by this independent action.

Id. at 645. The Court of Appeal went on to state that the failure to pursue administrative and judicial relief estopped the homeowner from relitigating the same issues, even in a 42 U.S.C. § 1983 cause of action. *Id.* at 645 - 648. The Court of Appeal, explained the rule:

[T]his rule is not the doctrine of "failure to exhaust administrative remedies." Rather it is a form of res judicata, of giving collateral estoppel effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.

Id. at pp. 645 – 646; *see also Swartzendruber v. City of San Diego* 3 Cal.App.4th 896, 909 (1992).

As these cases make clear, in order to bring its First Amendment claim premised on the legality of its signs, Metro Fuel must exhaust its administrative and judicial remedies challenging those decisions. Having failed to do so, Metro Fuel is now barred from bringing its claims in this Court. Metro Fuel cannot argue that its claims under the First Amendment vindicate a different primary right that would addressed in a writ of mandate proceedings under Code of Civil Proceedings section 1094.5 challenging the notices of violation or order of abatement. In fact, the California Court of Appeal rejected this same argument in *Swartzendruber*. Casting a claim in "constitutional terms" does not make it a different primary right.

In alleging her federal civil rights were violated (fifth cause of action), Swartzendruber alleged she was discharged in violation of her constitutional rights of due process and free speech by being terminated without cause, without giving her an opportunity to express legitimate concerns about safety, without providing meaningful safety training opportunities and without providing progressive discipline pursuant to City's own procedural manual. *Inasmuch as the primary right at stake was her right to continued employment and the harm suffered was loss of that employment, her fifth cause of action does not present a separate injury from that litigated before the Commission. Swartzendruber has merely restated her cause of action for wrongful termination in constitutional terms.*

Id. at p. 908.

Because California court would give preclusive effects to the unchallenged NOV's and Order of Abatement, this court must do so. *Miller*, 39 F.3d at 1033.

VI. BECAUSE METRO FUEL'S SIGNS ARE ILLEGAL FOR REASONS NOT CHALLENGED IN THE FIRST AMENDED COMPLAINT, METRO FUEL LACKS STANDING TO PURSUE THIS ACTION

A review of Metro Fuel's First Amended Complaint and its moving papers for this motion makes clear that it is only challenging San Francisco's ban on new general advertising signs. While

Metro Fuel defines San Francisco's "Sign Ordinance" as Article 6 of the Planning Code, Metro Fuel only attacks Section 611. But Metro Fuel lacks standing to challenge Section 611, because the signs identified in Metro Fuel's moving papers violate other sections of the Planning Code not put at issue in its First Amended Complaint or in are motion for preliminary injunction.

"The 'irreducible minimum' of standing under Article III of the Constitution is (1) an injury in fact, which is 'actual, concrete, and particularized'; (2) a casual connection between that injury and the defendant's conduct; and (3) a likelihood that the injury can be redressed by a favorable decision of the court." *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 891 (9th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). Each of these elements is "an indispensable part of the plaintiff's case" and "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.

As set forth above, the Planning Department and the Department of Building Inspection have issued NOVs, which Metro Fuel did not contest. Moreover, Metro Fuel's signs violate numerous sections of the Planning Code: 227(k); 606(a)(3); 607.1(e); 607.2(e); 607.3(c)(3); 608.5; 608.10(b); 710; 710.30; 711.30; 721; 721.30; 723.30; 815; 815.76; and 1111.7(a). Durandet Decl. ¶¶ 12- 16. Accordingly, even if the Court were to enjoin the City's enforcement of Section 611, Metro Fuel's signs would still be illegal. Therefore, Metro Fuel lacks standing to pursue its challenge to Section 611. *Get Outdoors II, LLC v. City of San Diego*, 560 F.3d at 891.

CONCLUSION

For the reasons stated above, Metro Fuel's motion for a preliminary injunction should be denied.

Dated: August 29, 2008

Respectfully submitted,
DENNIS J. HERRERA
City Attorney
KRISTEN A. JENSEN
THOMAS S. LAKRITZ
VICTORIA WONG
Deputy City Attorneys

By: _____/s/_____.

THOMAS S. LAKRITZ
Attorneys for Defendant CITY AND COUNTY OF
SAN FRANCISCO